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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 926

GULF POWER COMPANY,

Petitioner,

v.

ERNEST W. SHAHID AND MARGARET P. SHAHID,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing (by a vote of 2 to 1) the summary judgment entered by the United States District Court for the Northern District of Florida.

Opinions Below

The opinion of the District Court dated May 1, 1959, (R 232-236) is reported at 23 F.R.D. 245. This opinion is appended. (Appendix A)

The opinion of the Court of Appeals dated June 6, 1961, is reported at 291 F.2d 422 and is appended. (Appendix B) Petitioner's first application for rehearing was denied without opinion on July 19, 1961. (291 F.2d 422)

The opinion of the Court of Appeals dated February 1,

1962, denying the second application for rehearing is reported at 298 F.2d 793 and is appended. (Appendix C)

Jurisdiction

The judgment of the Court of Appeals is dated June 6, 1961, but was entered and became effective on February 1, 1962, the date of the denial of the second application for rehearing.

Jurisdiction is conferred on this Court to review the judgment by writ of certiorari by Title 28, Section 1254, of the United States Code.

Questions Presented

(1) Should not summary judgment be as available in a simple negligence case as in any other type of case where the facts have been fully developed by depositions and it is clear that negligence has not been, and cannot be, proven according to legal standards?

(2) Should Court of Appeals reverse a summary judgment without pointing out any overlooked fact issue for the guidance of the district judge who found that none existed, and without considering the "matter of law" relied on by a district judge that a case may not rest on pyramided inferences, thus leaving the trial court and the parties at a complete loss as to any fact issue to try or rule of law to apply, the reversal being grounded merely on the nebulous phrase "good judicial administration" and other wholly inapplicable statements borrowed out of context and at random from quite different and more complex actions?

Rule Involved

This case turns upon the application of Rule 56 of the Federal Rules of Civil Procedure relating to summary judgments. (Title 28, U.S.C.A.) The pertinent portion of the rule, extracted from paragraph (c), is as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Statement of the Case

The basic issue here, as stated in the dissenting opinion in the Court below, is whether the tendency of some courts "to emasculate the summary judgment rule as a mechanism for shortening the tedious proceedings by which justice is meted out", should be curbed to preserve the salutary purpose of the rule.

This case originated as a diversity action in the District Court for the Northern District of Florida. (Sec. 1332, Title 28, U.S.C.) The respondents, Ernest W. Shahid and wife (hereinafter frequently referred to as the plaintiffs), sued the petitioner, Gulf Power Company (hereinafter referred to as the defendant), for $500,000.00 damages for alleged negligence in the destruction by fire of their Shoreline Hotel on April 16, 1957.

The hotel was situated between U. S. Highway 98 and the Gulf of Mexico about 15 miles east of Fort Walton Beach, Florida. It was a two-story motel type building with wings extending in the shape of a "U". The power lines entered the hotel through a goose-neck metal service mast on the roof above the second floor. The lines

of defendant terminated just outside this goose-neck where they were spliced to plaintiffs' lines. The goose-neck mast, the wires encased in it, and all of the wires, switch boxes, circuits, fuses, electrical outlets, appliances, etc., within the hotel belonged to the plaintiffs, were installed by them and were their sole responsibility. (R 12-13, 195, 198)

The fire was discovered about 3:30 A.M. by a guest who aroused the plaintiffs by yelling "fire" and blowing the horn of his car. (R 64) The fire started in a ground floor storage and service room. All electrical wiring and equipment therein belonged exclusively to the plaintiffs. (R 64-65, 69) The fire with attendant sparks was initially concentrated in this downstairs storeroom. Shortly some additional sparking was observed in the upstairs storeroom immediately over the ground floor room where the fire first started. (R 72-74) The main switch to the hotel power supply (owned and installed by the plaintiffs) was located in this upstairs storage room. (R 40)

No one, not even the plaintiffs, ventured to give the cause of the fire or to specify any act of negligence chargeable to Gulf Power. One plaintiff testified as follows:

> "Q. Mrs. Shahid, do you know what caused this fire?
>
> "A. I could not say what caused it.
>
> "Q. Has any one professed to tell either you or your husband or any one else, to your knowledge, what caused the fire?
>
> "A. No, sir, not that I know of. Of course we discussed it quite often among ourselves and other people."

Mr. Shahid, the other plaintiff, while admitting that he "never even knew anything about electrical work" (R 112), ventured the guess that there was a dangerous overload of electricity "on the basis of the arcing and spark-

ing I saw before I left to call Gulf Power Company up." (R 132) The only arcing and sparking he saw was confined to his own premises (R 35-36, 119) and his own electrical equipment. How this showed any negligence on the part of the defendant is not explained.

The plaintiffs do claim the two emergency repairmen made statements that in effect inferred a malfunction of equipment but, as will be discussed more fully later, they quote both repairmen as stating that "they did not know" what caused the supposed malfunction, and there is nothing in the statements indicating any negligence or any causal connection with the fire whatever.

The case was fully developed on depositions. Extensive discovery depositions of both of the plaintiffs appear at R 18-143. They in turn took the depositions of the defendant's two emergency linemen (R 133-177), its local manager at Fort Walton Beach (R 178-191) and its district engineer. (R 191-230) These five depositions cover all the known evidence bearing on the case other than cumulative or corroborating testimony. The defendant also filed an affidavit by its vice-president and operating manager giving his expert opinion on the technical electrical aspects involved. (R 10-16) The plaintiffs in opposing the summary judgment motion relied on the same depositions (R 231-232) and, although they received the right to submit "further affidavits and relevant matter", they came forward with nothing more.

The summary judgment was the result of careful and deliberate action in the trial court. More than two years elapsed between the filing of the suit (March 15, 1957, R 2) and the summary judgment (May 4, 1959, R 236). The affidavit of defendant's expert was served on the plaintiffs more than four months before the hearing on the summary judgment motion. (R 9) The plaintiffs ad-

mitted in their depositions that they had consulted two independent experts and had received a written report from one (R 52, 142) but they offered no opinion or affidavit from either and announced that they did not intend to use an expert. (R 17)

The district judge summarized the situation when he said:

> "In the case before this Court we do not have merely strained evidence in support of plaintiffs' contention, we do not have merely weak evidence in its probative force, we simply do not have any substantial evidence of any nature which could give rise even to an inference, from substantial evidence, conjecture or otherwise, that the fire was due to the negligence of the defendant. . . .
>
> "To hold otherwise would be to submit to a jury conjecture, inference, speculation without even a jumping off place to reach some kind of a verdict.
>
> . . . . . .
>
> "The mere fact that premises are burned to which electrical current is supplied, standing alone, cannot be the basis for an action in negligence against the supplier of the current thereto." (R 235-236)

The Court of Appeals reversed by a vote of 2 to 1. The majority opinion points to no factual issue in dispute. It does unfortunately *attempt to create* an issue as to the admissibility in evidence of statements attributed to defendant's two linemen. However, these statements were admitted without exception in the trial court and duly considered by the district judge in the granting of summary judgment so no issue of admissibility was in the record or

before the Court of Appeals. Indeed, if any part of the statements received in evidence be inadmissible, only the defendant power company, not the plaintiffs, would gain from having them stricken. Hence, this issue, erroneously created by the Court of Appeals itself, does not exist and should not be injected to deny defendants an otherwise proper summary judgment.

The two opinions of the Court of Appeals emphasize that the moving party must under Rule 56 be entitled to a judgement "as a matter of law." However, the opinions do not consider at all the "matter of law" on which the district judge entered summary judgment, to-wit: that a case may not rest on pyramided inferences. Instead, the majority opinion equates to a "matter of law" quotations and holdings taken entirely out of context cautioning against too ready a use of summary judgments in quite different and much more complex cases. The opinion never reaches the basic "matter of law" as to whether there is any legally sufficient evidence or proper inferences (as opposed to the prohibited pyramiding of inferences) to create an issue as to any negligence of the defendant with respect to the fire.

Reasons for Granting the Writ

(1) The Court of Appeals has considerably restricted the scope of the summary judgment rule by engrafting on it for general application various limitations theretofore imposed in complex or unusual circumstances. It has equated these inappropriate limitations to a disentitlement to summary judgment "as a matter of law" even though the case itself presented no factual issue and the depositions of the plaintiffs themselves and admissions of their counsel showed they could not make a case without resorting to pyramided inferences contrary to both state and federal law.

(2) Uncertainty and confusion will result in the application of Rule 56 unless this Court reviews the decision below and sets forth affirmatively the area in which summary judgments may properly be granted, and makes clear that cautions heretofore expressed by it and courts of appeal are not to be applied out of context, and indiscriminately and cumulatively, as a reason for setting aside a summary judgment otherwise properly entered under the rule.

(3) The decision below is not in accord with decisions of this Court, and conflicts with decisions from other circuits, in that it unduly restricts the use of the summary judgment rule.

Argument

This case marks the extreme in judicial narrowing of the salutary summary judgment rule promulgated by this Court. Review by this Court is urgently required if plaintiffs and defendants alike are to have the benefit of this wholesome "mechanism for shortening the tedious proceedings by which justice is meted out."[1]

The significance of this urgency can be appreciated when it is realized that the volume of tort litigation exceeds any other type of civil action and constitutes 36% of the total civil case load of the district courts (1961 report of Administrative Office, page 152). Summary determination of whether a case presents a triable issue is beneficial to plaintiffs and defendants alike. A plaintiff should be able, in a case of clear liability, to obtain summary judgment on that issue with the beneficial result of a prompt settlement or a trial limited to the measure of damages. A defendant should be able in a case such as the one at bar, where the facts have been fully developed and even the Court of Appeals in reversing can pinpoint no issue of fact to be

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[1] Dissenting opinion in court below, 291 F.2d 422, 433.

tried, to avoid the unnecessary expense of preparing for and conducting a long and expensive trial. Indeed, both plaintiffs and defendants profit when spared from this unnecessary expense and time consuming effort.

The original notes of the Advisory Committee on rules traced the development of this summary judgment procedure in England and elsewhere and pointed out that while some jurisdictions made it available only as to liquidated claims or as to claims other than negligence actions, others had made it available in any action. They made it clear that the rule they were submitting "is applicable to all actions." See notes to Rule 56 in 28 U.S.C.A.[2]

That a case in the posture of the present one (the reversal of a summary judgment entered in the district court) is procedurally ripe for review on certiorari is well established by precedent.[3] The judgment of the Court of Appeals is deserving of review not only because it is "fundamental to the further conduct of the case",[4] but also because the interpretation and application of an important rule of civil procedure is involved.[5] Unless reviewed by the Supreme Court at this stage, the question of whether summary judgment should have been reversed in this or any other case will become moot by the remand from the Court of Appeals to the District Court for trial. Any further appeal would be from a judgment predicated

[2] Law Review articles hailed this provision as one that "will result not only in a wide use of the device but also eliminate much quibbling as to the nature of the various actions and their degree of 'liquidation'." 38 Columbia Law Review 1136.

[3] *Weston Salt Co. v. Sappington Co.*, 314 U.S. 488 (1942); *Elgin, Joliet & Eastern Ry. Co. v. Burkish*, 325 U.S. 711 (1945).

[4] *Land v. Dollar*, 330 U.S. 731, 734, N 2.

[5] Uniformity of application of this rule as promulgated by this Court compares in importance with uniformity of application of [illegible] rules which prompted certiorari in *U.S. v. Shaffer Brewing Co.*, 356 U.S. 227 (1958).

on a jury verdict or a directed verdict, or from a judgment *n.o.v.* Hence, if the rule is to be protected from erosion by overly cautious or overly sensitive appellate courts, a review by this Court of an improper reversal of a summary judgment is required. The decision below was by a divided court on a vote of 2 to 1. It nevertheless establishes an unfortunate precedent. Petitioner sought in vain to obtain a consideration *en banc* by the Court of Appeals under its recently adopted Rule 25(a). (28 U.S.C.A. Rules of Courts of Appeals, page 52 of 1961 cumulative pocket part).

Cases Dealing With Summary Judgment

We start with the premise that Rule 56(c) means what it says and that summary judgment "shall be rendered forthwith" if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This rule has been given effect by the Supreme Court.[6] On the other hand the Court has reversed a summary judgment where the moving party was not entitled to it as a matter of law,[7] or where on the record the fact issue appeared to be settled contrary to the contention of the movant.[8]

In addition, this Court has announced certain cautions or limitations that should be observed in unusual or complex cases. It reversed the Fifth Circuit's affirmance of

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[6] *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942); *Associated Press v. United States*, 326 U.S. 1 (1945); *International Salt Co. v. U.S.*, 332 U.S. 392 (1947); *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950).

[7] *Griffin v. Griffin*, 327 U.S. 220 (1946).

[8] *Arenas v. United States*, 322 U.S. 419 (1944).

a summary judgment fixing damages on the basis of disputed affidavits as to value from persons who were either officers of the defendant or whose interests were common with the defendant and who had given like testimony at a previous trial of the same cause in which the jury found contrary to their testimony."

This Court again reversed the Fifth Circuit's affirmance of a summary judgment in a case involving a matter of great public policy where new contentions were advanced in the Supreme Court for the first time, where the case was found to be "almost in a status in which it should come to a trial court", requiring the sorting of documents, analysis of statutes, the hearing and reduction of a mass of conflicting contentions as to fact and inference, etc., "a task primarily for a court of one judge, not for a court of nine."[9] It was in this background that this Court said:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.
>
> "Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and ampli

[9] *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).
[10] *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

fication of the record in the light of this opinion and of present contentions."

Kennedy v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948)

Following this second reversal the Fifth Circuit has become "gun-shy" as to summary judgments. It lifted the language quoted above from *Kennedy* v. *Silas Mason Co.* and applied it in a case entirely devoid of both the great public policy question and the record difficulties there.[11] The quoted language was removed even further from its original setting when the court below lifted it a second time (from its own first quote of it rather than directly from *Kennedy* v. *Silas Mason Co.*) and applied it here. (391 F.2d 422, 429). The case at bar lacks not only the involved record difficulties and public policy question of *Kennedy* v. *Silas Mason Co.* but also the situation in the Fifth Circuit case in which the quote was first used where the facts were peculiarly within the knowledge of officers of the defendant. Here the plaintiffs, not the defendant, have all of the knowledge of the fire on their own premises.

The most recent opinion of this Court dealing with the summary judgment rule is in *Poller* v. *Columbia Broadcasting System*, — U.S. —, 82 S.Ct 486 (February 19, 1962). The Court reversed a summary judgment on a vote of 5 to 4. In a substantial antitrust action defendant relied on affidavits from three of its own principal actors and a fourth affidavit from a party who stood to make a substantial profit. In that background the Court said:

"We believe that summary procedure should be used sparingly in complex antitrust litigation where motive

[11] *Chapman* v. *Hawthorne Flying Service*, 287 F.2d 539, 541 (1961).

> and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised."

Even in that background four Justices strongly dissented and felt "there is good reason for giving the summary judgment rule its full legitimate sweep." That case is in marked contrast with the case at bar where there is not the slightest suggestion of improper motive, intent or conspiracy, and there are no complex issues or hostile witnesses.

Conflicts Created by Decision Below

The decision below is not in accord with applicable decisions of this Court in that it goes well beyond any limitations or cautions imposed or suggested by this Court in the above cases applying the summary judgment rule. Moreover, it is in conflict with cases from other circuits where the rule has been given full effect in comparable situations. For example, the Tenth Circuit affirmed a summary judgment in favor of the defendant railroad in a negligence case growing out of a crossing accident. Its summary of the case before it could be applied verbatim here:

> "The appellants here do not contend that all of the pertinent facts were not in. They simply say that they presented a jury question, i.e., that the established facts were susceptible of an inference of actionable negligence on the part of the railroad. If therefore the established facts do not give rise to a permissible inference of actionable negligence, the

summary judgment was appropriate and ought to be affirmed."

Lopez v. *Denver & Rio Grande Western Railroad Co.*, 277 F.2d 830, 832. (1960)

The Fourth Circuit similarly affirmed a summary judgment in favor of a power company and a railroad in an accidental electrocution case. What that Court said could also be applied here, as follows:

"There is no evidence of the existence of any fact which, when construed in the light most favorable to the plaintiff, will support the requisite inference that either defendant was negligent in respect to the death of Robert Berry. Here the parties do not disagree as to the material facts of the case, their disagreement resting solely upon the application of the law to the facts. We are of the opinion that the action of the District Court in ordering summary judgment was proper and must be affirmed."

Berry v. *Atlantic Coast Line Railroad Company*, 273 F.2d 572, 582-583. (1960)

The Non-Existent Issue Created by the Court of Appeals

We emphasize again that the opinion of the Court of Appeals fails to bring to light a single factual issue for trial. The opinion, unfortunately and erroneously, does express doubt as to the admissibility of statements attributed to the defendant's two emergency repairmen and states that the scope of the agency of these repairmen to bind the defendant by their statements should be "more fully developed upon the trial." However, neither the agency nor the admissibility of the statements was chal-

lenged in the district court. Hence, no error was assigned, or could have been assigned, on this question. The defendant did argue in the Court of Appeals that the statements might not be competent, not only as beyond the scope of agency but as mere expressions of opinion rather than facts, citing 31 C.J.S. 1115. The Court of Appeals disagreed with this argument, unfortunately misconstrued it as if it were a ruling of the trial court, and gave this as the only specific issue to be "developed upon the trial."

But this scope of agency was a non-existent issue. The trial court had accepted and considered the statements of the repairmen, whether rightly or wrongly. The defendant sought earnestly to point this out to the Court of Appeals in both petitions for rehearing. In so doing, and in order to avoid an unfortunate and unnecessary reversal for an expensive and time consuming trial, the defendant readily conceded *arguendo* the agency of the repairmen, even to the extent of accepting the expressions of opinion attributed to them, and proceeded to point out that there was still no issue of fact presented or a basis for an inference of negligence.

The lineman Barfield is supposed to have said "Two well placed bullets could have ended all of that." This is the complete "admission." What inference of negligence does it support? Any customer can cut off his power by shooting out the transformer through which the current flows, regardless of whether his building is on fire or he just wants to indulge in a little mischief. Even Mrs. Shahid herself took the statement to mean only that the shots "could have severed their current from our buildings." (R 37) The second statement attributed to Barfield is that "I truthfully don't know why those jacks didn't work, but if your jacks had worked your hotel would never have burned down." A similar statement is attributed to the other lineman.

Ratliff. According to the statements themselves the linemen said that they just "didn't know"! Certainly no admission of negligence flows from lack of knowledge.

The power within the hotel had gone off by the time the plaintiffs were awakened by their guests shouting "fire" and, as power was still supplied to their neighbor's beer sign, obviously plaintiffs' own fuses had blown, probably because of a short or an overloaded circuit within the hotel itself (R 13, 213) for which the defendant would in no wise be responsible.

It may be reasonable to assume that the fire started from a short-circuit in plaintiffs' own interior wiring or equipment. However, it would also be just as reasonable to assume that a small fire, not of electrical origin, had started in the storage room, and that it broke down the insulation on plaintiffs' wiring or equipment, thereby causing electrical sparks. The record suggests a number of sources of such a fire. Extensive carpenter work was in progress in the wing where the fire started. (R 32, 102) The storage room where the fire began contained linens, toilet tissue, mops, buckets, brooms, wax (R 99) and perhaps some furniture polish with rags. (R 100) The air conditioning unit for both floors of that wing was also located in this storage room. (R 75) In addition, it contained a Butane gas hot water heater (R 75) which doubtless included a burning pilot light. Indeed, the flashes that the plaintiffs claim shot from this storage room across a five foot concrete sidewalk out on the grass lawn were the type that would be characterisitic of gas flashes rather than electrical. (R-13-14)

In any event, whether the fire was of electrical origin or was of some other origin with an early involvement of electricity, it had been in progress for some little time before the arcing and flashing on the outside wires leading

into the service mast began. It is therefore most likely that the fire that had originated on the plaintiffs' side of their main switch had in the meantime broken down the insulation on the still live wires in the service mast pipe that extended from the opposite side of their main switch out to defendant's wires and transformers. The inevitable consequence was a short-circuit in these conductor wires with the arcing and flashing observed by the plaintiffs. Thus we have the only reasonable explanation of this arcing and flashing. See the affidavit at R 10-16.

The jacks or fuses on the transformer pole, to which the statements of the linemen refer, could not have become involved sooner than the occurrence of this arcing and flashing, some time after the fire had originated and spread upstairs.

Electrical Fire Cases

In the case of *Reichholdt v. Union Electric Company*, 329 SW 2d 634, (1959) the Supreme Court of Missouri reversed the trial court for failure to grant a directed verdict in favor of the defendant power company. There the fire started on wires of the home owner between the connection with the power company wires at the service mast and the customer's main switch. This point was therefore on the power company side and beyond the protection of the customer's main switch or circuit breaker. In contrast, the evidence in the present case conclusively establishes that the fire originated on the plaintiffs' side and within the protection of their main circuit breaker or switch. (R 25, 35, 87) In the Missouri case, as here, the power company line ran from a transformer to the top of a service pole and the customer's wires ran from that point through a conduit to the circuit breaker or main switch and it was in this stretch of wire owned by

the customers but located on the power side of their main switch that the fire originated. They claimed, with the aid of expert testimony, that the power company should have used transformer fuses (jacks) of a lower rating sufficient to protect them from a short on their own wires that were not within the protection of their own circuit breaker. The Missouri Supreme Court disagreed.

> "We have concluded that defendant did not owe any duty to plaintiffs to fuse its transformer so as to afford protection to plaintiffs' property from damage resulting from defects in the wires owned and controlled by plaintiffs and hence the trial court erred in overruling defendant's motion for a directed verdict. We think that the rule we hereafter approve is not only reasonable and logical but is supported by the great weight of authority.
>
> "The duty and responsibility of a mere generating company is generally held to be limited to making a proper connection and delivering the electric current to the purchaser's wires and appliances in a manner which, so far as such delivery is concerned, protects life and property, and there is no duty of inspection to see that the purchaser's wires and appliances are in a safe condition and kept so.
>
> . . . . . .
>
> "In considering the difficulties that would attend the adoption of a contrary rule the court, in Minneapolis General Electric Co. v. Cronon, 8th Cir., 166 F. 651, 655, stated: 'Can the company, unbidden, enter at will the private house of the citizen and pass into its various rooms to inspect these wires every day

to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work; and, as absolute insurers under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all hours and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business.'"

In a suit seeking damages for the destruction of a dry cleaning plant by fire on the alleged negligence of a power company a directed verdict for the defendant was sustained on appeal in the following language:

"The most that the evidence shows is that there was a fire; that the conduit housing the wires was ruptured, and that this rupture could have caused the fire or that the fire could have caused the rupture.

"As far as this record shows, the fire could have started in any one of many different ways. Fires and their origin are of a mysterious character and it is not within the province of a jury or court to speculate as to their beginnings. The mere fact that the fire damage was greater in the vicinity of the meter board and conduit does not furnish the basis for a finding of fact that the fire originated in the conduit. A verdict against the defendant would necessarily be based upon conjecture and speculation. We consistently have held that liability cannot rest on such a basis. (Citing cases)

Smith v. Kentucky-West Virginia Power Co., 283 S.W. 2d 376, 378, (Kentucky, 1955)

A Case May Not Rest Only on Pyramided Inferences

The district court well summarized the pyramided inferences upon which the plaintiffs rely:

> "Here plaintiffs and their witnesses merely describe certain electrical phenomena upon which they wish the jury to be permitted to infer (1) that some unidentifiable dangerous condition existed, (2) further infer that the defendant was responsible for the condition, and (3) still further infer that this condition caused the fire." (R 235) (Numbering of inferences added)

The plaintiffs conceded that they were relying on these pyramided inferences. The pertinent portion of their brief in the Court of Appeals is quoted in the second footnote to the dissenting opinion below as follows:

> "The appellants are unable to pinpoint the exact cause of the fire, except that it can be reasonably inferred from their testimony (1) that there were some defects in Gulf Power Company's equipment, (2) which caused dangerous amounts of electrical current to come into the hotel, (3) starting the fire and preventing the appellants from extinguishing the said fire." (291 F.2d 422, 430) (Numbering of inferences added.)

A surprisingly parallel recent Florida case illustrates the rule that prohibits building an inference upon an inference. A passenger sued a common carrier for injuries suffered on a cruise ship when she fell from a ladder in descending from an upper bunk. Notwithstanding the duty resting on a common carrier to exercise the highest degree of care for the safety of its passengers, and al-

though the fall was due to an unexpected movement of the ladder, the appellate court reversed a judgment for the plaintiff and ordered the entry of a summary judgment for the carrier. The Court said:

> "Viewing the testimony and evidence in the light most favorable to the appellees, it appears that for approximately six days they had used the ladder in question without mishap and on the seventh day, when the appellee wife was attempting to descend from the bunk, she placed her foot on the ladder, it moved and she fell to the floor. There is an absence of any evidence relating the movement of the ladder to the alleged breach of duty on the part of the appellant and, under such circumstances, to permit the case to go to the jury invited speculation and conjecture on their part as to how the accident occurred. There is no question that the movement of the ladder was the immediate cause of the appellee's fall, but there is nothing in this record to show why it moved. The jury was required under the circumstances to infer that there was negligence on the part of the appellant in providing a defective or inadequate ladder and upon that inference, to infer further that such negligence was the proximate cause of the fall. Clearly the record does not support the conclusion that the initial inference was justified to the exclusion of any other reasonable inferences and therefore, the rule prohibiting the finding of an ultimate fact on an inference based upon an inference controls. (Citing cases)".

McCormick Shipping Corporation v. *Warner*, 129 So.2d 448, 449 (3rd District, Fla., May 8, 1961.)

The Florida rule has been clarified and underscored by the Florida Supreme Court in *Food Fair Stores, Inc.*, v. *Trussell*, 131 So. 2d 730 (1961). The Court quashed a reversal by the Florida district court of appeal and reinstated the summary judgment entered on affidavits by the trial court. This was a "slip and fall" case brought by a customer against a super market. The rule against pyramiding inferences is stated in that opinion as follows:

> "On the basis of the statement that in the past 'sometimes loose leaves would fall from the buggies to the floor' the respondents urge that a jury would be justified in inferring that in the instant case the loose leaves dropped from a buggy being pushed by an employee, that the leaf on the floor in this particular situation created a hazardous condition and that this condition was the proximate cause of Mrs. Trussell's injury. It is apparent that a jury could not reach a conclusion imposing liability on the petitioner without indulging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences."

The federal rule against pyramiding inferences is equally favorable to our position.[12] In a landmark case, *Manning* v. *Insurance Company*, 100 U.S. 693, 698, (1879), using the word "presumptions" interchangeably with "inferences", this Court said:

> "The only presumptions of fact which the law recognizes are *immediate* inferences from facts proved.

[12] Until now in the Fifth Circuit the state rule has been followed in testing the sufficiency of the evidence. Whether this is correct remains in doubt. *Dick* v. *N.Y. Life Ins. Co.*, 359 U.S. 437.

Remarking upon this subject in United States v. Ross (92 U.S. 281, 284), we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. *A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption.* There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass* v. *Mitchell*, 35 Pa. St. 440'." (Emphasis added.)

In *Laxton* v. *Hatzel & Buehler*, 142 F.2d 913 (6th Cir. 1944) plaintiff's case rested upon a proven failure of equipment. The plaintiff was a night watchman for an important defense plant. The defendant, under contract with plaintiff's employer, had installed extensive illumination of the plant grounds. A heavy exterior lamp fell on the plaintiff causing serious and permanent injuries. The lamp was so rigged that it could be lowered by a heavy chain in event of bulb failure or other trouble. Various safety devices were provided to prevent the lamp from falling. For some unexplained reason the lamp fell and plaintiff was the pathetic victim. After pointing out that there must be more than a mere possibility of fault on the part of defendant, the Court said:

> "Before appellant was entitled to have his case submitted to the jury, he was required to introduce substantial proof tending to show that some negligence of appellee was the proximate cause of his injuries. Our conclusion is that no such proof, direct or circumstantial, is found in the record. As above indicated, there is an inference that the lamp fell because the chain was not attached to the hook, but there is no evidence, if such condition existed, that appellee was responsible therefor. (142 F.2d 913;916)

The Court proceeded to affirm a directed verdict for the defendant, stating that:

> "'Before a Court may submit to the jury the question of whether an act is negligent there must be at least some substantial evidence of what the act is."

In cases where the dead man's statute [13] and the parole evidence rule [14] would prevent the plaintiff from making a case a summary judgment has been entered "as a matter of law." The same result should follow here where the plaintiffs cannot make a case because of the rule against pyramided inferences.

The Inapposite Cases on Which the Reversal Was Predicated

Finding no fact issue and no substantive "matter of law" on which to predicate its reversal, the Court of Appeals relied instead on a conglomerate of quotations taken out of context from earlier cases quite distinguishable from the present case. If these quotations and citations

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[13] *Appalonio* v. *Baxter*, 6th Cir., 1954, 217 F.2d 267.

[14] *Ford* v. *Luria Steel & Trading Corp.*, 8th Cir., 1951, 192 F.2d 889; *Gillis* v. *Miners and Merchants Bank of Alaska*, 9th Cir., 1959, 271 F.2d 163.

are permitted to apply in the case at bar, they can with equal justification be applied to reverse any summary judgment regardless of the type of action in which it arises. If allowed to stand as the law of the Fifth Circuit (with probable spread to other circuits) the summary judgment rule might as well be repealed. We examine these cases briefly.

1. *Palmer v. Chamberlin*, 5 Cir., 191 F.2d 532, 540. A quotation from this case states that the Court should not grant a summary judgment until all of the facts and circumstances have been sufficiently developed to enable it to make a correct determination of the question of law. The opinion, however, omits the last sentence of the paragraph from which the quote is taken which reads as follows:

> "In the case at bar that had been done, and we have no doubt that the Court correctly determined that the contract was valid." (Page 540)

In our case the record reflects 232 pages of proceedings and testimony fully covering the entire case. There is no suggestion that any other witness could add anything but cumulative testimony. There is no intimation that any information has been withheld by either party. There is nothing more to do at a trial except to re-hash the same testimony.[5] If *Palmer v. Chamberlin* is to be correctly applied, the Court here should say that as the law and the facts were fully developed the trial court correctly entered a summary judgment.

2. *Demandre v. Liberty Mutual Insurance Company*, 5 Cir., 1959, 264 F.2d 70, 72. In this case although the motion was denominated a motion for summary judgment, the

[5] The dissenter below aptly remarked that "both parties have milked the cow dry." 291 F.2d 422, 433

Court treated it as a motion for a judgment on the pleadings as there was no evidence or affidavits, only the pleadings plus an endorsement to the insurance policy involved in the suit. Broad coverage questions were presented on which evidence would supply the "specific facts" instead of the general allegations in the pleadings. In reversing, the Court of Appeals merely held that absent the essential facts a judgment on the pleadings was improper. Even the passage the opinion below quotes from this case is limited to "whether the 'facts' *stated in the complaint* present a 'genuine issue as to any material fact'." We submit that the more than 200 pages of actual testimony covering all of the essential facts make it entirely inappropriate to apply here a rule announced as to the propriety of a judgment on the pleadings.

3. *Alabama Great So. R. Co. v. Louisville & Nashville R. Co.*, 5 Cir., 1955, 224 F.2d 1, 5. Here again, the quotation is out of context. The case involved only the question of whether wanton negligence, as distinguished from simple negligence, had been established as a matter of law. That case points out that under Alabama law there is inherent in wanton negligence "the idea of moral fault, arising from a consciousness that the act done or omitted to be done would probably cause serious injury, and the doing or failing to do, the act, despite such consciousness, with reckless indifference to consequences." The Court then said:

> "In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment."

No wantonness, no motive, no intent, no subjective feelings and reactions, etc., are involved in the case here on appeal.

4. *Dyer* v. *MacDougall*, 2nd Cir., 1952, 201 F.2d 265, 269. Even the Court of Appeals itself, in denying the second application for rehearing, admitted "there is no indication here that any witness was reluctant so as to justify the application of Judge Learned Hand's comment 'that the immediate presence of a judge in a courtroom was likely to make him tell more.'" Even so, the Court below adhered to its reversal and refused to recognize that the testimony discloses no factual issue.

5. *Subin* v. *Goldsmith*, 2nd Cir., 1955, 224 F.2d 753, 758. This was a stockholder's derivative action attacking the proposed purchase by his corporation of another business to his alleged detriment. The defendant corporation moved for a summary judgment based on three affidavits that were found to be insufficient because they were either immaterial or not based on personal knowledge, and a fourth affidavit by only one member of the board who was without authority to speak for the other members. It was in this background that the language quoted in the opinion below was used, to the effect that where the facts are peculiarly in the knowledge of the defendants or their witnesses, and the motives and manipulations of the defendants are in issue, the plaintiff should have an opportunity to examine the witnesses at the trial as their demeanor may be the most effective impeachment.

6. *Scatille* v. *Inter Caribbean Corporation*, 1959, 361 U.S. 107, 109, 110. This case dealt only with the province of the jury to draw inferences with respect to causation or proximate cause, not with inferences as to the very existence of negligence itself. In *Scatille*, the negligence (or unseaworthiness) was not contested; nor was it denied

that the petitioner suffered a serious case of tuberculosis. The sole question was whether his fall on respondent's vessel could have proximately caused his tubercular condition.

Three links are essential if a plaintiff is to forge a chain sufficient to make out a case; to-wit: (1) negligence, (2) causation or proximate cause, and (3) resulting damage or injury. In *Sentilles*, the first and third were admitted and there was some evidence sufficient to go to the jury on number (2). Here however, only the third (damage) is established. Plaintiffs, admitting that they themselves cannot point out any negligence on the part of the defendant, asked the Court first to infer some unspecified negligence as a result of the normal manifestations of a short circuit (arcing and flashing) and then to infer a causal connection. They would build inference upon inference. *Sentilles* is no authority for this.

7. *Chapman* v. *Hawthorne Flying Service*, 5 Cir., 1961, 287 F.2d 539, 541. This case is comparable to case No. 5, *Subin* v. *Goldsmith*, *supra*, where, unlike the present case, the facts were peculiarly within the knowledge of the defendant. We have already noted how this *Chapman* case lifted from the Supreme Court opinion in *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, the high sounding phrase of "good judicial administration" and stretched its application to a situation quite different from its original employment. This lifting out of context was carried to an extreme when the phrase was borrowed from *Chapman*, rather than from its original source, and applied here in a case having nothing in common either with *Chapman* or *Kennedy* v. *Silas Mason Co.*

Conclusion

Since it is clear that the plaintiff's claim rests on pyramided inferences and therefore "as a matter of law" does not present a jury issue, and as there are no questions of credibility, concealment, conspiracy, hidden motives or the like requiring scrutiny and personal observation at a trial, clearly the Court of Appeals should be reversed and the summary judgment sustained. Why put the parties to the considerable expense and effort of a protracted trial when a directed verdict will inevitably ensue? Citing this Court in the text, Moore in his treatise says:

> "But functionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment. As Justice Jackson stated in *Poster v. Arkansas Natural Gas Co.*, 'a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.'"

6 Moore's Federal Practice 2020, ¶ 56.02[1] [18]

An affirmative endorsement by this Court of the proper use of summary judgment procedures would serve almost salutary purpose just at this time, following closely after the limitation recently imposed in *Poller v. Columbia Broad-*

[18] At least two decisions of the Fifth Circuit subscribe to the above principle but are departed from in the case at bar. *Firemen's Mut. Ins. Co. v. Ajamian Mfg. Co.*, 5th Cir. 1943, [illegible] F.2d 250, 251; *Board of Palm Beach District v. Gotthais*, 5th Cir., 1939, 104 F.2d 706.

casting System, Inc., supra. It would also serve to prevent the further misuse as a basis for the indiscriminate reversal of summary judgments of the phrase "good judicial administration" that this Court originated in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). Until there is an affirmative recognition and delineation of the proper use of the rule it is *functus officio* in the Fifth Circuit for all practical purposes. It has been buried wrongfully in the name of "good judicial administration" and on the basis of the cumulative effect of a collection of quotations applied contrary to the context from which they were taken.

For the reasons above set forth the petitioner prays that writ of certiorari be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION

CIVIL ACTION NO. 845

ERNEST W. SHAHID and MARGARET P. SHAHID, individually and doing business as SHORELINE HOTEL and COTTAGE COLONY, *Plaintiffs*,

v.

GULF POWER COMPANY, a corporation, *Defendants*.

MEMORANDUM-DECISION

This matter is before the Court on motion of defendant for summary judgment pursuant to Rule 56 of Federal Rules of Civil Procedure. Plaintiffs' complaint consists of three Counts. The motion is directed to each of the Counts and will be discussed here individually.

The material allegations of the First Count are that defendant Power Company negligently failed to cut off the current after it was notified of fire at plaintiffs' premises, resulting in the destruction of plaintiffs' property by fire. The plaintiffs do not charge the defendant with any responsibility for the origin of the fire in this Count.

The depositions and affidavits relied upon by defendant in support of its motion in this regard are in no way disputed by any of the documents relied upon by plaintiffs. It affirmatively appears in regard to this issue as to whether or not the defendant negligently failed to cut off power promptly after notification by the plaintiffs that the facts are not in dispute. The plaintiffs in their depositions aver that the defendant's servicemen were slow in arriving at the scene, but it is not disputed that the power was not already off, and there is no showing that the defendant could, or should, have cut off the power sooner than was accomplished prior thereto by safety mechanisms. This being so, there is not even the possibility of inference that the exertion of more diligence by defendant would have prevented or mitigated the damage.

Counts Two and Three of the complaint charge the defendant with negligently starting the fire, either through failure to provide protection from an overload of current or from transmitting current to the hotel premises to the defendant's premises in such quantity or in such manner as to start the fire. Admittedly, the fire was of electrical origin. The depositions of plaintiffs establish that the fire started on the ground floor of the hotel building in a room housing the electrical equipment of the plaintiffs. Plaintiffs state that they saw arcing and sparking in this room, and later on the service lines running from the defendant's transmitter pole to the service mast on top of the hotel, and that, therefore, there must be an inference at least that the fire might have started from some negligence on the part of the defendant.

Even placing upon the defendant, as the law does, the duty of extraordinary care in the operation of its business and considering the matter here on motion for summary judgment most stringently against the movant, the Court concludes nevertheless that there is not even the modicum of evidence necessary to submit a material question of fact to the jury and that defendant's motion for summary judgment should be granted.

In reaching this conclusion, the Court has considered most carefully the case of Yelverton v. Adams, decided by the United States Court of Appeals for the Fifth Circuit and reported in 262 F.2d 146. In *Yelverton* the District Court's granting of motion for summary judgment was reversed with the following comment:

> "While the evidence as to whether the fire was electrically caused is wholly circumstantial and looked at as to its weight, seems rather too tailored, pieced out and made to order to carry the fullest conviction, we are of the clear opinion that we cannot say of it, as the district judge did, that it is wholly insufficient to take that phase of the case to the jury. On the contrary, circumstantial as the evidence is, bolstered as it is by self serving and interested testimony and smacking to some extent of a contrived or confected case, we think we must say that these mani-

festations more affect its weight than its admissibility. In short, whether on the whole it presents a credible or an incredible story is a question of fact and not of law, is not for the court but for the jury to say, and it was error for the district judge, without putting the defendants to their proof, to take the case from it."

In the case before this Court, we do not have merely strained evidence in support of plaintiffs' contention, we do not have merely weak evidence in its probative force, we simply do not have any substantial evidence of any nature which could give rise even to an inference, from substantial evidence, conjecture or otherwise, that the fire here was due to the negligence of the defendant. In *Yelverton* there was at least some proof of a jumper wire or other specific condition that the power company in that situation was charged with having failed to detect upon inspection, or having failed to remedy after complaint. Here plaintiffs and their witnesses merely describe certain electrical phenomena from which they wish the jury to be permitted to infer that some unidentifiable dangerous condition existed, further infer that the defendant was responsible for the condition, and still further infer that this condition caused the fire.

The entire burden of all the evidence before the Court in this case compels the Court to the view that there is a very obvious distinction between the two cases. To hold otherwise would be to submit to a jury conjecture, inference, speculation without even a jumping off place to reach some kind of verdict. The mere fact that premises are burned to which electrical current is supplied, standing alone, cannot be the basis for an action in negligence against the supplier of the current thereto.

Order will be entered this day in conformity herewith.

Dated this 1st day of May, 1959.

G. HAROLD CARSWELL,
United States District Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18177

ERNEST W. SHAHID and MARGARET P. SHAHID, Individually and d/b/a SHORELINE HOTEL and COTTAGE COLONY, *Appellants*,

versus

GULF POWER COMPANY, *Appellee*.

Appeal from the United States District Court for the Northern District of Florida

(June 6, 1961.)

Before RIVES, CAMERON and BROWN, Circuit Judges

RIVES, Circuit Judge: This appeal is from a summary judgment in favor of Gulf Power Company, defendant below, and against Ernest W. and Margaret P. Shahid, plaintiffs below. The plaintiffs sought $500,000.00 damages from the defendant for its alleged negligence in the destruction by fire of the plaintiffs' Shoreline Hotel on April 16, 1956. The questions presented are whether there was any genuine issue as to any material fact as to the defendant's alleged negligence, and whether the defendant was entitled to judgment as a matter of law. Rule 56 (c), Federal Rules of Civil Procedure.

The salient facts were these: Plaintiffs' hotel was situated facing Highway 98 and the Gulf of Mexico about fifteen miles east of Fort Walton Beach, Florida, and a little less than a mile west of a substation maintained by the defendant. At the substation the current which was conducted to plaintiffs' premises from the east was reduced to about 12,000 volts. Plaintiffs' hotel was serviced by wires passing through a transformer situated just off of plaintiffs' premises where the current was further reduced to 208 and 120 volts.

On the morning of the fire, between three and four o'clock, plaintiffs were awakened by loud shouting of a guest accompanied by continuous blowing of his automobile horn. Upon arising they found that the hotel was in total darkness, and upon looking across the road they saw that lights were burning in a nearby establishment, from which they knew that the trouble was upon their own premises. Dressing quickly, they went towards the point where the guest was giving the alarm and found sparks, which they took to be electrical sparks, being emitted from a ground floor storage room through a louvered door. In this room were located the fuse boxes and circuit breakers connected with the hotel's electrical system. The room above, from which some evidences of fire were observed, contained the main switch by which the electrical current into the hotel could be cut-off. The electrical equipment on the hotel premises and belonging to plaintiffs led to a goose-necked mast on top of the hotel where defendant's service wires were connected. Soon after plaintiffs arrived downstairs, bright flashing and arcing were observed at and nearby this mast and along defendant's wires where they were connected with the wiring system of plaintiffs.

As soon as they had been able to size up the situation and before much evidence of actual fire had appeared, plaintiff Ernest Shahid, finding all telephones in the vicinity inoperative, drove to Silver Beach, about seven miles away, and called defendant's emergency serviceman Ratliff in Fort Walton reporting the situation and asking that he come promptly and disconnect the electrical wiring. After Ernest Shahid had returned, his wife carried their children to Silver Beach and there by telephone reported the fire to several fire companies in nearby towns.

Ratliff, immediately upon being called by Shahid, telephoned his co-worker Barfield and the two hastily dressed. Barfield drove defendant's service truck to Ratliff's house and picked him up, and they proceeded to plaintiffs' hotel. When they arrived, the arcing at and around the service mast had ceased and the wires to the hotel had been severed and were lying on the ground.

The issues framed by the pleadings and further evidence developed by depositions and affidavits are stated in the opinion of the district court granting the defendant's motion for summary judgment, which opinion is reported in 23 Federal Rules Decisions at page 245.

Before rendering summary judgment the district court must determine both (1) "that there is no genuine issue as to any material fact" and (2) "that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Federal Rules of Civil Procedure. Requisite (2) does not automatically follow from requisite (1).

In *Palmer* v. *Chamberlin*, 5 Cir., 1954, 191 F.2d 532, 540, we said:

> ". . . before rendering judgment the Court must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law. Where, as in this case, the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for a summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law."

In *Demandre* v. *Liberty Mutual Insurance Company*, 5 Cir., 1959, 264 F.2d 70, 72, we stated that:

> ". . . whether the 'facts' stated in the complaint present a 'genuine issue as to any material fact' as F.R.Civ.P. 56 requires is really to be measured by whether no evidence could be offered to support the plaintiff's theory."

In *Alabama Great So.R. Co.* v. *Louisville & Nashville R.Co.*, 5 Cir., 1955, 224 F.2d 1, 5, we recognized "that as a general proposition the issue of negligence, including the related issue of wanton conduct, is ordinarily not susceptible of summary adjudication."

In *Dyer* v. *MacDougall*, 2nd Cir., 1952, 201 F.2d 265, 269, Judge Learned Hand pointed out the necessity in some cases of an examination of a witness in open court, "that the immediate presence of a judge in a court-room was likely to make him tell more."

In *Subin* v. *Goldsmith*, 2nd Cir., 1955, 224 F.2d 753, 758, referred to approvingly by this Circuit in *Alabama Great So.R. Co.* v. *Louisville & Nashville R.Co.*, *supra*, Judge Frank stated that:

> "Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment."

As to whether the first requisite for summary judgment—"that there is no genuine issue as to any material fact"—has been met,

> ". . . the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits."

Ramsouer v. *Midland Valley R. Co.*, 8th Cir., 1943, 135 F.2d 101, 106; see also, 6 Moore's Federal Practice, 2nd ed., p. 2114.

The evidence showed that the defendant furnished the electric power to plaintiffs' hotel. The district court found that:

> "Admittedly, the fire was of electrical origin. The depositions of plaintiffs establish that the fire started on the ground floor of the hotel building in a room housing the electrical equipment of the plaintiffs. Plaintiffs state that they saw arcing and sparking in this room, and later on the service lines running from the de-

fendant's transmitter pole to the service mast on top of the hotel, and that, therefore, there must be an inference at least that the fire might have started from some negligence on the part of the defendant."

Shahid v. Gulf Power Company, N.D.Fla., 1959, 23 F.R.D. 245, 246.

Mrs. Shahid testified that after all evidences of power over the main switch of the hotel were gone, "it was evident that we were still being fed current and yet there were no lights on. Q. What was the evidence that you were still being fed current? A. Seeing the electrical arc through from their transformer into our building." R. L. Pulley, defendant's vice president and operating manager, testified by affidavit:

> ". . . that any short-circuit or failure between the customers main fuses and the transformers would be protected against by the fuses of the power company on the pole with the transformers; that these fuses upon disintegrating ordinarily cause the hinged holder or 'jack' to drop down, giving a visual indication from the ground that the circuit is open, but the dropping of the holder or 'jack' is not essential to the opening of the circuit, the protection being afforded solely by the disintegration of the fuse; that it would be possible for the holder or 'jack' to fail to drop after the 'blowing' of the fuse due to corrosion or other cause but this rarely, if ever, occurs."

Ernest Shahid testified in part:

> "Q. In the first count of your complaint you state that there was a dangerous overload of electricity where the defendant's lines entered your premises. On what do you base that allegation?
>
> "A. On the basis of the arcing and sparking I saw before I left to call Gulf Power Company up.
>
> "Q. Do you base it on anything else?
>
> "A. On the shooting coming through that storage room next to room No. 5.

"Q. Do you base it on anything else?

"A. Not unless it would be on the trouble I had been having with my light bill and the lights dying down and coming up instantly."

Mr. Dawkins, defendant's District Engineer, testified that, "ordinarily arcing on the secondary lines will blow the transformer fuses."

The defendant's lineman, emergency serviceman, Ratliff testified:

"Q. Is there anything at the pole at the Shoreline Hotel which would cut off the current to the hotel in the event of trouble?

"A. They have jacks there.

"Q. How do those operate?

"A. They have a fuse in them and when the fuse blows they drop out.

"Q. What would cause a fuse to blow out?

"A. Shortage on the low side of the fuse would cause them to blow.

"Q. In other words, if there was a short on the Shoreline Hotel side of the transformers it would blow the fuses?

"A. That's right.

"Q. What would it take in the way of a short to blow a fuse? Can you tell us what sort of condition would have to exist before the fuses would blow?

"A. No, I would not. There would be lots of different things that would blow a fuse. Just a shortage inside the switch or anywhere in his place would blow our fuse.

"Q. Would you say that would afford some protection to the Shoreline Hotel, then?

"A. Yes, or a shortage it would.

"Q. You say on a shortage it would. Is there any other thing that would blow a fuse in the jacks?

"A. Did you mean other things besides a shortage?

"Q. Yes, what I mean, are there other things besides a shortage which would cause the jacks to blow?

"A. Yes, overload or a lot of things can cause the fuse to blow.

"Q. Assume that there happened to be an overload on the line on this night, at what stage would the jacks function in order to cut off the current, on the overload?

"A. The same as the other.

"Q. Would the fuses blow in time to save the hotel from a dangerous overload of current?

"A. They are supposed to.

"Q. If there were arcing between the pole, which I understand is located right outside the Shoreline Hotel, if there were arcing from the pole to the hotel, would you say there was a condition of overload or shortage, involved?

"A. Well——

"Q. What would cause the arcing?

"A. I could not tell you what would cause the arcing between the hotel and the pole. It would blow the fuse also.

"Q. It should blow the fuse?

"A. Yes, it would blow the fuse that went to it"

The defendant's other lineman and emergency serviceman, Barfield, testified:

"Q. Are there any means whereby the current would cut off automatically in the event of trouble?

"A. On the transformer pole.

"Q. The jacks they referred to?

"A. Yes.

"Q. What sort of trouble would it take for the jacks to operate?

"A. An overload.

"Q. Assuming there was a dangerous overload coming into the Shoreline Hotel, would those jacks, if they were functioning properly, cut off the current?

"A. Yes, sir.

"Q. Did you make any statement to any one at the scene concerning shooting the transformers with a shotgun or any other kind of gun?

"A. No, sir.

"Q. You made no such statement?

"A. No, sir.

"Q. Did you make a statement to any one else concerning the use of a shotgun or some other type of gun?

"A. No, sir."

Mr. Shahid had testified:

"A. . . . Mr. Barfield made this statement to this Brent Neilson, 'Two well-placed bullets could have ended all of that.'

"Q. Could have ended all of that?

"A. It could have severed their current from our building.

"Q. How did he happen to make that statement?

"A. Mr. Neilson is noted for his fancy guns, and he saw him there, and he asked him where one of his fancy guns was, and he said 'Why' and he told him."

District Engineer Dawkins testified:

"Q. A statement has been attributed to one Gulf Power Company employee, Barfield, to the effect that he could have shot out the transformers. Is that possible?

"A. Shot out, what do you mean?

"Q. Shot them out.

"A. It is possible."

Ernest Shahid testified that:

". . . . Mr. Ratliff told me the night of the fire when he came but there after Mr. Barfield left me, he came over when I was on this end, and I was talking to Mr. Ratliff, and he told me he could not understand why those jacks didn't kick off, and he said something about using some kind of long thing to get those wires

on, but he said he could not understand why those jacks didn't go off. Mr. Ratliff made that statement to me."

Ernest Shahid further testified:

"A. . . . . At a later time I asked Mr. Barfield I wondered why those jacks didn't work on the hotel, and he said, 'I truthfully don't know why those jacks didn't work, but if your jacks had worked your hotel would never have burned down.

"Q. Mr. Barfield said that?

"A. Mr. Barfield made that statement to me the morning of the fire.

"Q. When he serviced the pump?

"A. Yes."

Appellee argues that the purported declarations by Ratliff and Barfield are not competent evidence. We quote from appellee's brief:

"'Even if these purported declarations might otherwise present an issue, they are not admissible in evidence.

"'Competency of the agent to make admissions on the subject is not alone sufficient; the admission which it is sought to use must have been made in connection with the discharge of the agent's duty, and must be a statement of fact, rather than an expression of opinion.'

31 C.J.S. 1115

"The sole duty of these two employees was to render emergency repairs. They were not authorized to make statements or express opinions binding on the defendant. The statements do not relate to any repair work done by them but to a supposed condition existing before their arrival and with which they had nothing to do, and which required no work or repairs on their part."

If the question be considered as involving merely a procedural rule as to the admissibility of evidence, then, under Rule 43 (a) Federal Rules of Civil Procedure, the rule, whether federal or state, which favors reception of the evidence governs. *New York Life Ins. Co. v. Schlatter*, 5 Cir., 1953, 203 F.2d 184, 188; *Hambrice v. F. W. Woolworth Co.*, 5 Cir., No. 18674, n. s. decided May 9, 1961. If, on the other hand, the question turns upon substantive law as to the scope of the agent's or employee's authority (see IV Wigmore on Evidence, 3rd ed., Sec. 1078, p. 119), then the state law would control.

In a recent case involving injuries sustained as a result of falling on stairs immediately inside the door at the service department entrance of a Montgomery Ward & Company store, the District Court of Appeals of Florida, Second District, held that a statement of the assistant manager concerning a sign on the door at the time of the accident was admissible, and discussed the Florida law as follows:

> "The courts of this country are somewhat in conflict on the question of whether an agent's statements, which are vicarious admissions against the interests of his principal, are admissible in evidence in an action against the principal by a third party. If such an admission were made by the principal himself, it would be clearly admissible as an exception to the hearsay rule. This question, therefore, turns upon the rules of agency and whether the agent was acting within the scope of his authority.
>
> "We think that in their many conflicting opinions the various courts of this country have developed three different rules. One of these rules allows the evidence if the agent was authorized by the principal to make statements for him concerning the subject matter of the statement. *A second rule will allow the agent's admission if the statement concerned a matter within the scope of his agency and was made before the termination of the agency.* A third rule adds to the former two rules the requirement that the statement be a part

of the res gestae. It is very obvious that the first rule is far more strict than the second because it requires the agent to have express statement-making authority. The second rule does not require such authority to have been expressly granted but implies it from the agent's authority or employment with the subject matter of the statement. It is this second rule, in view of the Florida holdings, with which we are concerned.

"In Myrick v. Lloyd, 158 Fla. 47, 27 So.2d 615, 616, we think the Supreme Court of Florida has answered one phase of the defendant's question. In that case a father was being driven on a business trip by his son, who was also his employee, when the son ran over a boy. After the accident the father directed the son to take the boy's parents to the hospital. While en route to the hospital the son told the parents of the injured boy that the accident was his own fault and not the fault of their boy. The Supreme Court held that the son was the agent of the father and the statements of admission made to the parents was (sic) admissible against the father. The court said, in part, as follows:

"'. . . The best authority, to our mind, is found in Wigmore on Evidence, Vol. IV, Sec. 1078, page 119: "He who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself."

"'We recognize a conflict of authority on this question; however we have chosen the above as the more practical and liberal rule. The purpose here was not to prove agency. That fact had already been established. When this statement was made the status of principal and agent continued. It is a fact that the agent was acting pursuant to express authority and direction of the principal when the statement was made. It is also a fact that the statement had ref-

> erence to matters occurring within the scope of his employment. When so acting the agent was acting for the principal who might have made such an admission himself against his own interest. It is our conclusion that in this case the statement was admissible. . . .'
>
> The court held, in accordance with the second rule stated above, and its opinion is ample authority for admission of the statement with which we are concerned, notwithstanding the fact that the statement in the instant case was made nine days after the accident." (Emphasis supplied.)

Montgomery Ward & Co. v. Rosenquist, 2nd Cir., 1959, 112 So. 2d 885, 886, 887.

Applying the italicized "second rule," *supra*, held applicable in Florida, it is not disputed that if the statements were made at all, they were made before the termination of the agency of either Ratliff or Barfield. Ernest Shahid testified that Ratliff's statement was made the night of the fire, and Barfield's the morning of the fire when he serviced the pump. A prima facie case for admissibility has, we think, been made. The scope of the agency of Ratliff and of Barfield may be more fully developed upon the trial. Summary judgment should be refused until the facts have been sufficiently developed to enable the court to be reasonably certain that it is making a correct determination of the question of the scope of agency of Ratliff and of Barfield. See *Palmer v. Chamberlin*, 5 Cir., 1951, 191 F.2d 532, 540.

The defendant rests heavily on the extensive affidavit of its vice president and operating manager, R. L. Pulley, an expert electrical engineer, and emphasizes the fact that the plaintiffs produced no opinion from an expert and announced that they did not "intend to use an electrical engineer or expert at the trial (other than Wallace Dawkins, an employee of the defendant, to be called as an adverse witness. His deposition taken by plaintiffs is also submitted for consideration in connection with this motion.)" Expert Pulley's affidavit concluded:

"That based on his years of experience and knowledge in the field and the testimony given in said depositions the affiant finds no evidence whatever indicating a failure on the part of the defendant to provide protection to the plaintiffs nor is there any evidence indicative of the transmitting of current in a quantity or a manner that would have contributed to the destruction of the plaintiffs' hotel."

We think that there is applicable here the principle announced by the Supreme Court in *Sentilles* v. *Inter-Caribbean Corporation*, 1959, 361 U.S. 107, 109, 110, to the effect that the members of the jury, rather than the expert witnesses, are the ones sworn to make a legal determination of the question of causation. The plaintiffs are, of course, not bound by their expressed intention not to use an electrical engineer or expert at the trial.

We conclude as we did in *Chapman* v. *Hawthorne Flying Service*, 5 Cir., 1961, 287 F.2d 539, 541:

"Without intimating any conclusions on the merits, and . . . without implying that the plaintiff's proof as it now stands would warrant submission to a jury, we nevertheless conclude that it is the part of good judicial administration for the facts in this case to be more fully developed before the trial court determines that there is truly no genuine issue as to any material fact. Rule 56, Federal Rules Civil Procedure, 28 U.S.C.A.

"The judgment is reversed for further proceedings not inconsistent with this opinion."

REVERSED AND REMANDED.

CAMERON, Circuit Judge, Dissenting:

I am unable to agree with my Brethren who have decided that the summary judgment entered by the court below should be reversed and this case sent back for a hearing on the merits. I think that a directed verdict will inevitably ensue and that, under the circumstances ap-

pearing in this record, the long and tedious hearing upon such a procedure ought to be avoided.

The case is a close one, but I think that it is as important to see that the salutary summary judgment procedures are utilized in proper cases as it is to protect litigants from their employment in cases where the record shows that the party appealing is entitled to such a hearing.

It should be understood that the testimony of every single person who knew anything about the fire was taken by deposition and full right of cross examination offered, except for the affidavit of appellee's vice president, Pulley, which was not controverted or challenged by the appellants even though they had employed experts with the view of using them if their statements had been favorable. The court below, therefore, had before it everything which would be developed in a trial upon the merits, and it found that no negligence had been shown by appellants. This being true, I think we should affirm the conclusions reached by it.

It is helpful to consider at this point exactly what the lower court did say about the failure of the appellants to sustain the burden resting upon them in the presentation to it.[1] It will be found helpful, too, to set forth the

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[1] ". . . Plaintiffs' complaint consists of three counts. . . .

"The material allegations of the First Count are that defendant Power Company negligently failed to cut off the current after it was notified of fire at plaintiffs' premises, resulting in the destruction of plaintiffs' property by fire.

"*The plaintiffs do not charge the defendant with any responsibility for the origin of the fire in this Count.*

"The depositions and affidavits relied upon by defendant in support of its motion in this regard are in no way disputed by any of the documents relied upon by plaintiffs. It affirmatively appears in regard to this issue as to whether or not the defendant negligently failed to cut off power promptly after notification by the plaintiffs that the facts are not in dispute. The plaintiffs in their depositions aver that the defendant's servicemen were slow in arriving at the scene, but it is not disputed that the power was already off, and there is no showing that the defendant could, or should, have cut off the power sooner than was accomplished prior thereto by safety mechanisms.

summary of the argument advanced before us in the brief of appellants.[2]

It is well to recall also that the case was heard by the court below on the second motion for summary judgment in which the appellee relied upon the pleadings, the depositions of the appellants, the affidavit of R. L. Pulley, ap

This being so, there is not even the possibility of inference that the exertion of more diligence by defendant would have prevented or mitigated the damage. . . .

"Even placing upon the defendant, as the law does, the duty of extraordinary care in the operation of its business and considering the matter here on motion for summary judgment most strongently against the movant, the court concludes nevertheless that there is not even the modicum of evidence necessary to submit a material question of fact to the jury and that defendant's motion for summary judgment should be granted.

"In reaching this conclusion, the Court has considered most carefully the case of Yelverton v. Adams, decided by the United States Court of Appeals for the Fifth Circuit and reported in 262 F.2d 146. [Here the court below quoted from the decision in the *Yelverton* case.]

"In the case before this court, we do not have merely strained evidence in support of plaintiffs' contention, we do not have merely weak evidence in its probative force, we simply do not have any substantial evidence of any nature which could give rise even to an inference, from substantial evidence, conjecture or otherwise, that the fire here was due to the negligence of the defendant. In Yelverton there was at least some proof of a improper wire or other specific condition that the power company in that situation was charged with having failed to detect upon inspection, or having failed to remedy after complaint. Here plaintiffs and their witnesses merely describe certain electrical phenomena from which they wish the jury to be permitted to infer that some unidentifiable dangerous condition existed, further infer that the defendant was responsible for the condition, and still further infer that this condition caused the fire.

"The entire burden of all the evidence before the court in this case compels the court to the view that there is a very obvious distinction between the two cases. To hold otherwise would be to submit to a jury conjecture, inference, speculation without even a jumping off place to reach some kind of verdict. The mere fact that premises are burned to which electric current is supplied, standing alone, cannot be the basis for an action in negligence against the supplier of the current thereto. . . . " [Emphasis added.]

2 "The Appellants are unable to pinpoint the exact cause of the fire, except that it can be reasonably inferred from their testimony that there were some defects in Gulf Power Company's equipment

pellee's vice president, and a list of witnesses furnished by the appellants pursuant to pretrial order, including the statement that they did not intend to produce as a witness any electrical engineer or other expert; and upon the written opposition of appellants to this motion in which it was stated that appellants would rely upon the pleadings, the depositions of the two appellants, and the depositions of four of appellee's employees, including the two servicemen Ratliff and Barfield who were called to the fire.

It is undisputed in the record that the service men arrived well in advance of the fire fighting equipment, that the west end of the hotel was generally in flames, that the arcing at and around the service mast had ceased, and that the wires to the hotel had been severed and were lying on the ground. The testimony of appellants that the service men came onto the scene slowly and stood around doing nothing is lacking in probative value for the reason that the severance of the wires they had been called upon to effect had already been accomplished.

Soon after the two servicemen had arrived the desire was expressed that the hotel water pump be reconnected so that water from it could be used on the raging fire. One of the service men mounted the pole upon which the transformer was situated and, finding that all of the fuses had disintegrated, refused one of the lines and connected it up with the pump, which immediately began discharging water in a normal way.

I deal, first, with appellants' contention that the servicemen did not proceed with reasonable speed in cutting off the electrical current after being advised of the emergency. I think that the court below was correct in holding that there was no issue of fact on this point. I pass over the settled principle that estimates, especially under

which caused dangerous amounts of electrical current to come into the hotel, starting the fire and preventing the appellants from extinguishing the said fire. There is also evidence that the [illegible] Power Company delayed unreasonably in cutting the current off, and closely connected with that theory of recovery is the proposition that the power company was negligent in failing to provide the customer an adequate protective device which would operate to cut off the current in event trouble such as this developed."

circumstances of stress such as were present here, are not highly probative, *Illinois Central Railroad Co. v. Underwood*, 5 Cir., 1956, 235 F.2d 868, 873, and cases cited. Disregarding the estimate of time given by the two servicemen and accepting that of appellants, and relating it to the other testimony given by the two appellants, I do not think that there was any substantial evidence that the servicemen were guilty of any unreasonable delay which contributed in any way to the starting of the fire or its spread.

By appellants' own proof, the current serving the lighting system of the hotel, both inside and out, had been cut off by the operation of safety devices before appellants were awakened. Assuming that the testimony of appellants that they discovered arcing and flashing at and near the entrance mast after they had gone into the yard of the hotel tended to prove that current was still being delivered to that point, appellant Shahid testified that, after he had driven to Silver Beach and 'phoned serviceman Ratliff and had immediately returned at high speed to the hotel, the arcing at the entrance mast had ceased. There was no evidence, therefore, that the current had not then been cut off entirely, which was considerably before the servicemen could have arrived; since the appellant Shahid did not have to stop to dress after he telephoned Ratliff, and his return journey was less than half that which the service men had to take. This, coupled with the undisputed proof that the wires had separated and fallen to the ground by the time the servicemen arrived, and that when, shortly thereafter, one of them mounted the pole to the transformer, he found that all of the fuses had disintegrated, eliminated the time it took the servicemen to arrive at the scene of the fire after notice as a significant element in the proof.

Much is made by appellants over statements the appellants claimed to have elicited from Ratliff and Barfield sometime after their arrival to the effect that "had the 'jacks' worked on the night of the fire, the hotel would not have burned." This statement, attributed to Ratliff

and Barfield by one or both of the plaintiffs, was described in appellants' brief as "by far the most damaging evidence against appellee."

In describing these packs, Pulley, who had been chief engineer for appellee for more than thirty years, used these words in his affidavit: ". . . these fuses upon distintegrating ordinarily caused the hinged holder or 'jack' to drop down, giving a visual indication from the ground that the circuit is open, but the dropping of the holder or 'jack' is not essential to the opening of the circuit, the protection being afforded solely by the disintegration of the fuse . . ."

These statements attributed to the servicemen were not, therefore, of any probative value in the court's consideration of the case because, *by introducing the depositions of Ratliff and Barfield unconditionally, the appellants made them their witnesses;*[4] and, moreover, the servicemen were not asked about these alleged statements when appellants' attorney was examining them, so that the predicate was not laid to impeach these witnesses. This is so even if, contrary to the Federal Rule, appellants would have had the right to impeach their own witnesses. 4 Moore's Federal Practice, 2d Ed., pp. 1204-1205, and 5 ib. pp. 1348-1349. Finally, opinions given by the servicemen outside the scope of their agency (which involved only emergency work on the appellee's equipment) would not, if entitled to any consideration at all, have *any effect towards establishing as fact the truth of the matter dealt with the opinions.* Cf. 21 C.J.S., Evidence §343, pp. 1113, et seq.

Appellee filed the affidavit of its operating manager, a graduate electrical engineer duly registered in the State of Florida. Substantially five months elapsed between the filing of this affidavit and the hearing of the motion for summary judgment, and appellants failed to avail themselves of the right to cross examine this witness, and failed to offer any evidence contravening what Pulley stated. They admitted that they had consulted and had reports

[4] Rule 26(f) F.R.C.P.

from one or more experts, but they did not offer their testimony. Pulley was acquainted with appellee's equipment at and near the hotel and the installations on its premises. He swore that the transformers, fuses, lightning arrestors and other items of equipment serving appellants' property were all standard equipment which was designed to protect, and did actually protect, appellants from overloading, short circuits and like occurrences which might endanger the electrical system maintained by appellants and their property upon which it was situated. Having heard the testimony of all of the witnesses whose depositions were offered by the parties and being acquainted with the room from which the sparks were said to have emanated, as well as all of the equipment in and around the premises, electrical and otherwise, he gave as his expert opinion that the sparks in the storage room were produced by the gas hot water heater and gas lines within that room; that the arcing and flashing at and near the service mast were the aftermath, and not the cause, of the fire, being the product of fire damage to the insulation of the service wires sufficient to cause short circuits, which in turn blew the fuses on the transformer pole. What he said was not disputed, but on the other hand the testimony of appellants tended to corroborate him.

They had, since the original wiring was installed in the hotel premises, added a walk-in freezer unit and air conditioning equipment, which latter gave them so much trouble that they had installed three additional towers to make the equipment work more efficiently. The trouble they experienced with bulbs burning out and fuses blowing on the hotel premises was, without dispute, attributable to their own overloading of the electrical wiring in the hotel. Without question, the trouble began within the hotel premises; and its own protective devices had operated to shut off all of the lighting within them; and the fire had been in progress some time before there was any arcing or flashing near or upon the wires of appellee.

From the whole record it is clear that appellants failed to introduce substantial evidence of negligence to make

a case concerning which reasonable minds might reach different conclusions. They have produced no proof which tends to establish that any negligence on the part of the appellee caused the fire or contributed to its spread. In a long line of cases this Court has held that "speculation cannot supply the place of proof." *Theriot* v. *Mercer*, 1959, 262 F.2d 754, 759; *Smith* v. *General Motors Corp.*, 1955, 227 F.2d 210; *McNamara* v. *American Motors Corp.*, 1957, 247 F.2d 445; *duPont* v. *Kissinger*, 1958, 259 F.2d 411, certiorari denied, 359 U.S. 950; and *Nashville Bridge Co.* v. *Ritch*, 1960, 276 F.2d 171.

In this case no such proof was made and no circumstance points to the probability that further proof will be turned up. Substantially a year elapsed between the time of the fire and the beginning of this action, and two years between the time the action was begun and the time of its submission. The parties have developed their respective contentions by taking the depositions of both appellants and of all of the employees of appellee who had any knowledge of or dealings with appellants' and appellee's electrical installations at and near the damaged premises or of the facts attending the fire. Under these circumstances I think that the court below was justified in disposing of the case under summary judgment procedures in the manner and for the reasons set forth in Footnote 1 *supra*. Cf. *Chambers & Co.* v. *The Equitable Assurance Society of the United States*, 5 Cir., 1955, 224 F.2d 339; *Whitaker* v. *Coleman*, ib. 1940, 115 F.2d 305; *King* v. *The California Co.*, ib. 1955, 224 F.2d 193; *Inglett & Co.* v. *Everglades Fertilizer Co.*, ib. 1958, 255 F.2d 342; and *Digal* v. *Union Bag Co.*, ib., 1959, 263 F.2d 387.

I am not unfamiliar with the fact that there is a disposition on the part of some courts to rule summary judgment out as a remedy in negligence cases. I do not see any justification for such an attitude. Indeed, a large proportion of the cases coming before us involve negligence. If, from the depositions and affidavits placed before a court, it is clear that those claiming negligence have not proven it according to legal standards, I think that summary judg-

ment ought to be entered in a negligence case to the same extent that it is in any other case.

Nor do I adhere to the concept sometimes found in court opinions that summary judgment ought to be denied because from the whole record it looks as if the party opposing it might be able to find some evidence to raise an issue of fact. On the other hand, I think it is clear from all of the authorities that the duty rests upon one against whom summary judgment is sought to bring forward competent proof developing an issue with the facts which have been adduced, under legal standards, by the person seeking summary judgment. The Rules themselves, in my opinion, make such an attitude mandatory.[4]

In this case both parties have "milked the cow dry." The case has been pending a long time. There is, in my opinion, no indication that the appellants can ever improve upon the testimony they placed before the court. In my opinion, the testimony justifies the granting of a summary judgment, and the opinion of the majoritiy tends to emasculate the summary judgment rule as a mechanism for

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[4] E.g., Rule 56(c) providing in part:

". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

And Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit the affidavit to be obtained by depositions to be taken or discovery to be had or may make such other order as it just."

shortening the tedious proceedings by which justice is meted out. I therefore respectfully dissent.

A true copy.

Test: EDWARD WADSWORTH, Clerk, U. S. Court of Appeals, Fifth Circuit.

By CLARA R. JARVIS, *Deputy.*

New Orleans, Louisiana,

Apr. 12, 1962.

APPENDIX C

(February 1, 1962)

On Second Application for Rehearing

Before Rives, Cameron and Brown, Circuit judges

Per Curiam: Some parts of the majority opinion on original hearing, we now think, unduly restrict the office of summary judgment in negligence actions. The test of a genuine issue of fact is not as indicated in our quotation from *Demandre* v. *Liberty Mutual Insurance Company*, 5 Cir., 1959, 264 F. 2d 70, 72, "whether no evidence could be offered to support the plaintiff's theory," unless that expression is considered along with the duty of the party against whom a summary judgment is moved to produce and serve opposing affidavits. Rule 56, Federal Rules of Civil Procedure. Our quotation from *Alabama Great Southern R. Co.* v. *Louisville & Nashville R. Co.*, 5 Cir., 1955, 224 F. 2d 1, 5, must be taken with the qualification that there are cases where summary judgment may properly be rendered in the determination of issues of negligence. See 6 Moore's Federal Practice, Sec. 56.17 (42), pp. 2231-2233. There is no indication here that any witness was reluctant so as to justify the application of Judge Learned Hand's comment "that the immediate presence of a judge in a court-room was likely to make him tell more." *Dyer* v. *McDougall*, 2d Cir., 1952, 201 F. 2d 265, 269.

We thought that we had made clear that we were not ruling that this case must be submitted to the jury. That is a question on which the district court must rule when the evidence is all in and the defendant moves for a directed verdict or for judgment n.o.v. Rule 50, Federal Rules of Civil Procedure. Nor did we intend to attempt to rule on the admissibility of any so-called admissions by the defendant's agents or employees. Our discussion of that subject was simply a part of our reasoning that the defendant had failed to show both that there is no genuine issue as to any material fact and that the defendant is entitled to judgment

as a matter of law. Our re-study of the case has not convinced us otherwise. The second petition for rehearing is therefor

DENIED.

CAMERON, Circuit Judge: "I dissent from the denial of the Petition for Rehearing".

A true copy.

Test: EDWARD W. WADSWORTH, Clerk, U. S. Court of Appeals, Fifth Circuit.

By CLARA R. JAMES,
Deputy

New Orleans, Louisiana

April 12, 1962

APPENDIX D

JUDGMENT

No. 18177

Extract from the Minutes of June 6, 1961

ERNEST W. SHAHID and MARGARET P. SHAHID, individually and d. b. a SHORELINE HOTEL and COTTAGE COLONY,

versus

GULF POWER COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Gulf Power Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"CAMERON, Circuit Judge, Dissenting"